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**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS**

**JASON GERLACH, on behalf of
himself and all others similarly
situated,**

Plaintiff,

vs.

**CONN APPLIANCES, INC D/B/A
CONN'S**

Defendant.

CASE NO. 5:15-cv-00886

CLASS ACTION

**Complaint for Damages and
Injunctive Relief Pursuant To The
Telephone Consumer Protection Act,
47 U.S.C § 227 *et seq.***

Jury Trial Demanded

INTRODUCTION

1. Jason Gerlach ("Plaintiff") brings this class action for damages, injunctive relief, and any other available legal or equitable remedies, resulting from the illegal actions of Defendant CONN APPLIANCES, INC. D/B/A CONN'S, ("CONN'S") and its present, former, or future direct and indirect parent companies, subsidiaries, affiliates, agents, assigns, and/or related entities, in negligently, and/or willfully, contacting Plaintiff on Plaintiff's cellular

1 telephone without his prior express consent, in violation of the Telephone
2 Consumer Protection Act, 47 U.S.C. § 227 *et seq.*, (“TCPA”). Plaintiff alleges
3 as follows upon personal knowledge as to himself and his own acts and
4 experiences, and, as to all other matters, upon information and belief, including
5 investigation conducted by his attorneys.

6 JURISDICTION AND VENUE

7 2. Jurisdiction is proper under 28 U.S.C. § 1332(d)(2) of the Class Action
8 Fairness Act (“CAFA”) because Plaintiff alleges a national class, which will
9 result in at least one class member belonging to a different state than that of
10 Defendant. Plaintiff seeks up to \$1,500.00 (one-thousand-five-hundred dollars)
11 in damages for each call in violation of the TCPA, which, when aggregated
12 among a proposed class numbering in the thousands, or more, exceeds the
13 \$5,000,000.00 (five-million dollars) threshold for federal court jurisdiction
14 under CAFA. Therefore, both the elements of diversity jurisdiction and CAFA
15 jurisdiction are present.

16 3. Venue is proper in the United States District Court for the Western
17 District of Texas pursuant to 18 U.S.C. § 1391(b)(c) and § 1441(a) because
18 Defendants are deemed to reside in any judicial district in which they are subject
19 to personal jurisdiction at the time the action is commenced, and because
20 Defendant’s contacts with this district are sufficient to subject it to personal
21 jurisdiction. On information and belief, Defendant has made the same calls
22 complained of by Plaintiff within this judicial district, such that some of
23 Defendant’s acts in making such collection calls have occurred within this
24 district.

25 PARTIES

26 4. Plaintiff is, and at all times mentioned herein was, a citizen and resident
27 of the State of Texas who resides in Devine, Texas.

28 5. Plaintiff is informed and believed, and thereon alleges, that Defendant,
CONN’S, is a debt collector, and is, and at all times mentioned herein was, a

Corporation founded under the laws of the State of Texas, whose primary corporate offices are located at 3295 College Street, Beaumont, Texas 77701 making the Defendant a citizen of Texas for diversity purposes. Plaintiff alleges that at all times relevant herein Defendant conducted business in the State of Texas and in the County of Bexar, and within this judicial district. Defendant attempts to collect debts by, among other means, making calls to cellular phones.

THE TELEPHONE CONSUMER PROTECTION ACT OF 1991
(TCPA), 47 U.S.C. § 227

6. In 1991, Congress enacted the Telephone Consumer Protection Act, 47 U.S.C. § 227 (TCPA),¹ in response to a growing number of consumer complaints regarding certain telemarketing practices.

7. The TCPA regulates, among other things, the use of automated telephone equipment, or “autodialers.” Specifically, the plain language of section 227(b)(1)(A)(iii) prohibits the use of autodialers to make any call to a wireless number in the absence of an emergency or the prior express consent of the called party.²

8. According to findings by the Federal Communication Commission (“FCC”), the agency Congress vested with authority to issue regulations implementing the TCPA, such calls are prohibited because, as Congress found, automated or prerecorded telephone calls are a greater nuisance and invasion of privacy than live solicitation calls, and such calls can be costly and inconvenient. The FCC also recognized that wireless customers are charged for incoming calls whether they pay in advance or after the minutes are used.³

¹ Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991), codified at 47 U.S.C. § 227 (TCPA). The TCPA amended Title II of the Communications Act of 1934, 47 U.S.C. § 201 *et seq.*

² 47 U.S.C. § 227(b)(1)(A)(iii).

³ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003).

9. On January 4, 2008, the FCC released a Declaratory Ruling wherein it confirmed that autodialed and/or prerecorded message calls to a wireless number by a creditor (or on behalf of a creditor) are permitted only if the calls are made with the “prior express consent” of the called party.⁴ The FCC “emphasize[d] that prior express consent is deemed to be granted only if the wireless number was provided by the consumer to the creditor, and that such number was provided during the transaction that resulted in the debt owed.”⁵

FACTUAL ALLEGATIONS

10. At all times relevant, Plaintiff was a citizen of the State of Texas. Plaintiff is, and at all times mentioned herein was, a “person” as defined by 47 U.S.C. § 153 (32).

11. Defendant, CONN’S is, and at all times mentioned herein was, an entity that meets the definition of “person,” as defined by 47 U.S.C. § 153 (32).

12. At all times relevant Defendant conducted business in the State of Texas and in the County of Bexar, within this judicial district.

13. Beginning no later than January 2013, and continuing through approximately July of 2015, Defendant, CONN’S, called Plaintiff on his cellular telephone number, ending in “4662”, in an attempt to collect a debt. Plaintiff received multiple calls a day from CONN’S and has, at the time of filing this complaint, received more than 20 debt collection calls from CONN’S.

14. Plaintiff did not provide Defendant with his cellular phone number. Plaintiff did not give Defendant prior express consent to call him on his cellular telephone with the use of an autodialer and/or prerecorded message, pursuant to 47 U.S.C. § 227 (b)(1)(A).

15. Defendant, CONN’S, touts itself as a specialty retailer currently operating approximately 90 retail locations in Arizona, Colorado, Louisiana,

⁴ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* (“FCC Declaratory Ruling”), 23 F.C.C.R. 559, 23 FCC Rcd. 559, 43 Communications Reg. (P&F) 877, 2008 WL 65485 (F.C.C.) (2008).

⁵ *FCC Declaratory Ruling*, 23 F.C.C.R. at 564-65 (¶ 10).

1 Mississippi, Nevada, New Mexico, North Carolina, Oklahoma, South Carolina,
2 Tennessee, and Texas. CONN’S also states that it provides flexible in-house
3 credit options for its customers.⁶ Based upon information and belief, CONN’S
4 handles collections on the delinquent credit accounts and in the process calls cell
5 phone numbers where it lacks express written consent. Based upon the manner
6 and method by which CONN’S sought to collect from Plaintiff, Plaintiff
7 believes that CONN’S employs common methods to collect debts—methods
8 which violate the TCPA. The Plaintiff avers that CONN’S uses an ATDS to
9 collect upon debts in the illegal manner described above.

10 16. On information and belief, Defendants may have obtained Plaintiff’s
11 cellular telephone number from a third party, or by “trapping” or “skip tracing”
12 the number (i.e., making a record of his cell phone number using caller
13 identification technology) but did not receive that number from Plaintiff.

14 17. Notwithstanding the fact Plaintiff did not provide Defendant his cellular
15 number at any time, Defendant, or its agents, have called Plaintiff on his cellular
16 telephone via an “automatic telephone dialing system,” (“ATDS”) as defined by
17 47 U.S.C. § 227 (a)(1). This ATDS has the capacity to store or produce
18 telephone numbers to be called, using a random or sequential number generator,
19 and to dial such numbers.

20 18. Said “ATDS” calls were made from approximately June 2013 to
21 approximately July of 2015, all in violation of the TCPA.

22 19. The telephone number Defendant and/or its agents called is assigned to a
23 cellular telephone service for which Plaintiff incurs a charge for incoming calls
24 pursuant to 47 U.S.C. § 227 (b)(1).

25 20. These telephone calls constituted calls that were not for emergency
26 purposes as defined by 47 U.S.C. § 227 (b)(1)(A)(i).

27
28 ⁶ Found at <http://ir.conns.com/>, last visited on September 11, 2015.

21. These telephone calls by Defendant and/or its agents violated 47 U.S.C. § 227(b)(1).

22. Under the TCPA and pursuant to the FCC's January 2008 Declaratory Ruling, the burden is on Defendants to demonstrate that Plaintiff provided express consent within the meaning of the statute.

Class Action Allegations

23. Plaintiff brings this action on behalf of himself and on behalf of all others similarly situated ("the Class").

24. Plaintiff represents, and is a member of, the Class, consisting of:

All persons within the United States who received any telephone call from Defendant or its agents to said person's cellular telephone through the use of any automatic telephone dialing system who did not provide prior express consent during the transaction that resulted in the debt owed, within the four years prior to the filing of the Complaint in this action.

25. Excluded from the Class are Defendants and any entities in which Defendant has a controlling interest, Defendants' agents and employees, the Judge to whom this action is assigned and any member of the Judge's staff and immediate family, and claims for personal injury, wrongful death, and/or emotional distress.

26. Plaintiff does not know the number of members in the Class, but believes the Class members number in the thousands, if not more. Thus, this matter should be certified as a Class Action to assist in the expeditious litigation of this matter.

27. Plaintiff and members of the Class were harmed by the acts of Defendant in, but not limited to, the following ways: Defendant, either directly or through its agents, illegally contacted Plaintiff and the Class members via their cellular telephones by using an autodialer, thereby causing Plaintiff and the Class members to incur certain cellular telephone charges or reduce cellular telephone

1 time for which Plaintiff and the Class members previously paid; by having to
2 retrieve or administer messages left by Defendants during those illegal calls; and
3 invading the privacy of said Plaintiff and the Class members. Plaintiff and the
4 Class members were damaged thereby.

5 28. This suit seeks only damages and injunctive relief for recovery of
6 economic injury on behalf of the Class and it expressly is not intended to request
7 any recovery for personal injury and claims related thereto. Plaintiff reserves the
8 right to expand the Class definition to seek recovery on behalf of additional
9 persons as warranted as facts are learned in further investigation and discovery.

10 29. The joinder of the Class members is impracticable and the disposition of
11 their claims in the Class action will provide substantial benefits both to the
12 parties and to the court. The disposition of the claims in a class action will
13 provide substantial benefit to the parties and the Court in avoiding a multiplicity
14 of identical suits. The Class can be identified through Defendants' or their
15 agents' records.

16 30. There is a well-defined community of interest in the questions of law and
17 fact involved affecting the parties to be represented. The questions of law and
18 fact to the Class predominate over questions that may affect individual Class
19 members, including the following:

20 a) Whether, within the four years prior to the filing of this Complaint,
21 Defendants and/or their agents made any call (other than a call made for
22 emergency purposes or made with the prior express consent of the called party)
23 to a Class member using any automatic telephone dialing system to any
24 telephone number assigned to a cellular telephone service;

25 b) Whether Defendants can meet its burden of showing they obtained prior
26 express consent (i.e., consent that is clearly and unmistakably stated), during
27 the transaction that resulted in the debt in question be owed, to make such
28 calls;

c) Whether Defendants' conduct was knowing and/or willful;

1 d) Whether Defendants are liable for damages, and the extent of statutory
2 damages for such violation; and

3 e) Whether Defendants should be enjoined from engaging in such conduct
4 in the future.

5 31. As a person that received numerous calls using an automatic telephone
6 dialing system, without his prior express consent, Plaintiff is asserting claims
7 that are typical of the Class. Plaintiff will fairly and adequately represent and
8 protect the interests of the Class in that Plaintiff has no interests antagonistic to
9 any member of the Class.

10 32. Plaintiff and the members of the Class have all suffered irreparable harm
11 as a result of the Defendants' unlawful and wrongful conduct. Absent a class
12 action, the Class will continue to face the potential for irreparable harm. In
13 addition, these violations of law would be allowed to proceed without remedy
14 and Defendants would undoubtedly continue such illegal conduct. Because of
15 the size of the individual Class members' claims, few Class members could
16 afford to seek legal redress for the wrongs complained of herein.

17 33. Plaintiff has retained counsel experienced in handling class action claims
18 and claims involving violations of the Telephone Consumer Protection Act.

19 34. A class action is a superior method for the fair and efficient adjudication
20 of this controversy. Class-wide damages are essential to induce Defendants to
21 comply with federal and California law. The interest of Class members in
22 individually controlling the prosecution of separate claims against Defendants is
23 small because the maximum statutory damages in an individual action for a
24 violation of this statute are minimal. Management of these claims is likely to
25 present significantly fewer difficulties than those presented in many class claims.
26 Defendants have acted on grounds generally applicable to the Class, thereby
27 making appropriate final injunctive relief and corresponding declaratory relief
28 with respect to the Class as a whole.

FIRST CAUSE OF ACTION
NEGLIGENT VIOLATIONS OF THE TELEPHONE CONSUMER PROTECTION ACT
47 U.S.C. § 227 ET SEQ.

35. Plaintiff incorporates by reference all of the above paragraphs of this Complaint as though fully stated herein.

36. The foregoing acts and omissions of Defendant constitute numerous and multiple negligent violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227 *et seq.*

37. As a result of Defendant's negligent violations of 47 U.S.C. § 227 *et seq.*, Plaintiff and the Class are entitled to an award of \$500.00 in statutory damages for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B). Plaintiff and the Class are also entitled to and seek injunctive relief prohibiting such conduct in the future.

38. Plaintiff and Class members are also entitled to an award of attorneys' fees and costs.

SECOND CAUSE OF ACTION
KNOWING AND/OR WILLFUL VIOLATIONS OF THE
TELEPHONE CONSUMER PROTECTION ACT
47 U.S.C. § 227 ET SEQ.

39. Plaintiff incorporates by reference the above paragraphs 1 through 34, inclusive, of this Complaint as though fully stated herein.

40. The foregoing acts and omissions of Defendant constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above-cited provisions of 47 U.S.C. § 227 *et seq.*

41. As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227 *et seq.*, Plaintiff and the Class are entitled to treble damages, as provided by statute, up to \$1,500.00, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

42. Plaintiff and the Class are also entitled to and seek injunctive relief prohibiting such conduct in the future.

43. Plaintiff and Class members are also entitled to an award of attorneys' fees and costs.

PRAYER FOR RELIEF

Wherefore, Plaintiff respectfully requests the Court grant Plaintiff and the Class members the following relief against Defendants:

**FIRST CAUSE OF ACTION FOR NEGLIGENT VIOLATION OF
THE TCPA, 47 U.S.C. § 227 ET SEQ.**

- As a result of Defendants' negligent violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for herself and each Class member \$500.00 (five-hundred dollars) in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B).

- Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting such conduct in the future.

- An award of attorneys' fees and costs to counsel for Plaintiff and the Class.

- An order certifying this action to be a proper class action pursuant to Federal Rule of Civil Procedure 23, establishing an appropriate Class and any Subclasses the Court deems appropriate, finding that Plaintiff is a proper representative of the Class, and appointing the lawyers and law firms representing Plaintiff as counsel for the Class.

- Any other relief the Court may deem just and proper.

**SECOND CAUSE OF ACTION FOR KNOWING AND/OR WILLFUL VIOLATION
OF THE TCPA, 47 U.S.C. § 227 ET SEQ.**

- As a result of Defendants' willful and/or knowing violations of 47 U.S.C. § 227(b)(1), Plaintiff seeks for herself and each Class member treble

1 damages, as provided by statute, up to \$1,500.00 (one-thousand-five-hundred
2 dollars) for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and
3 47 U.S.C. § 227(b)(3)(C).

4 • Pursuant to 47 U.S.C. § 227(b)(3)(A), injunctive relief prohibiting
5 such conduct in the future.

6 • An award of attorneys' fees and costs to counsel for Plaintiff and
7 the Class.

8 • An order certifying this action to be a proper class action pursuant
9 to Federal Rule of Civil Procedure 23, establishing an appropriate Class and any
10 Subclasses the Court deems appropriate, finding that Plaintiff is a proper
11 representative of the Class, and appointing the lawyers and law firms
12 representing Plaintiff as counsel for the Class.

13 • Any other relief the Court may deem just and proper.

14 **TRIAL BY JURY**

15 Pursuant to the seventh amendment to the Constitution of the United States of
16 America, Plaintiff is entitled to, and demands, a trial by jury on all counts so triable.

17 Date: October 16, 2015

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19 **LAW OFFICES OF DAVID P. SCHAFFER**

20
21 By: /s/ Brian J. Trenz

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